No. 42257-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DARCUS ALLEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR PIERCE COUNTY

BRIEF OF APPELLANT

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A. INTRODUCTION

After a six-week trial the State proved beyond a reasonable doubt that Maurice Clemmons killed four police officers. However, Maurice Clemmons was dead and not on trial; having been fatally shot in a confrontation with police a few days after his crime.

Instead, the person on trial for four counts of aggravated first degree murder was Dorcus Allen. Unlike its case against Maurice Clemmons, the State could not prove beyond a reasonable doubt that Mr. Allen committed the crime even under the State's accomplice theory.

To bridge this gap between its proof and the law, the State relied upon a misstatement of the law regarding knowledge and accomplice liability. In an effort to free itself of the burden of proving Mr. Allen possessed the requisite knowledge, the State presented a closing argument which focused on redefining the term knowledge to include what Mr. Allen "should have known." Thus, the State repeated numerous times, Mr. Allen was guilty so long as the jury found "he should have known." That purposeful misstatement of the law led to

Mr. Allen's conviction, and now requires reversal of that conviction.

B. ASSIGNMENTS OF ERROR

1. The trial court violated the Sixth Amendment and deprived Mr. Allen of the due process of law by entering convictions in the absence of proof beyond a reasonable doubt of each element of the offense.

2. The deputy prosecutors' closing argument repeatedly misstated the law and created a mandatory presumption in violation of the Fourteenth Amendment.

3. The trial court erred in failing to suppress the fruits of the warrantless arrest of Mr. Allen in violation of Article I, section 7 and the Fourth Amendment to the United States Constitution.

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8. The trial court erred and violated the Due Process Clause of the Fourteenth Amendment by refusing to instruct the jury on lesser included offenses.

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13. The trial court erred and exceeded its sentencing authority in imposing an exceptional sentence.

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15. The trial court's failure to ensure the jury's verdict was free of improper influences deprived Mr. Allen of his Sixth and Fourteenth Amendment rights.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment and the Fourteenth Amendment's Due Process Clause require the State prove each element of an offense to the jury beyond a reasonable doubt. To convict someone as an accomplice, Washington law requires the State prove beyond a reasonable doubt the person knew he was assisting someone in the commission of the crime charged. To prove knowledge, Washington law requires the State prove beyond a reasonable doubt that a person has actual subjective knowledge of the facts necessary to constitute the crime charged. Where the State did not prove beyond a reasonable doubt that Mr. Allen had actual subjective knowledge that he was assisting in the commission of four murders do his four convictions of first degree murder violate the Sixth and Fourteenth Amendments?

2. The requirements of the Sixth and Fourteenth Amendments that the State prove each element of an offense beyond a reasonable doubt are violated where the jury is presented with a mandatory presumption, requiring them to find an element if the State proves some other fact. The Washington Supreme Court has held that the provisions of RCW 9A.08.010(1)(b)(*ii*) permit, but do not require, a jury to find a person has knowledge if the person possesses facts which would lead a reasonable person to believe that facts exist that are described by a statute defining an offense. The statute does not permit a negligent-ignorance theory, and in the end the State must still prove the person has actual subjective knowledge. The State repeatedly told the jury that, even if Mr. Allen did not actually know, it was sufficient to find he "should have known" Mr. Clemmons was going to commit a crime. Did the State create a mandatory presumption in violation of the Sixth and Fourteenth Amendments?

3. A prosecutor violates the Fourteenth Amendment's Due Process Clause when he misstates the law and endeavors to relieve the State of its burden of proving each element of an

offense. The prosecutors purposefully and repeatedly told the jury, over Mr. Allen's objection and in direct contradiction of long-settled Washington law, that Mr. Allen was guilty so long as he "should have known" Mr. Clemmons intended to commit murder. Did the State's purposeful misconduct violate the Fourteenth Amendment's Due Process Clause?

4. Article I, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution do not permit a warrantless police entry of a home to arrest a person based solely upon probable cause. The warrantless entry may only be justified if the State proves an exception exists to the warrant requirement. In certain cases exigent circumstances such as hot pursuit, risk of flight, or the risk of the destruction of evidence may provide such an exception. Where the State did not establish any exigent circumstance justified the officers' warrantless entry, did the entry of a motel room and the subsequent arrest of Mr. Allen inside violate the Article I, section 7 and the Fourth Amendment?

5. Where a statement is obtained from a person following a warrantless police entry of a home to arrest a person based

solely upon probable cause, Article I, section 7 requires suppression of any statement made following that arrest unless the State establishes in the trial court that an exception to the exclusionary rule applies. The State did not attempt to prove an exception to the exclusionary rule to the unlawful police entry and arrest of Mr. Allen. Did the trial court err in failing to suppress Mr. Allen's statements?

6. Where a statement is obtained from a person following a warrantless police entry of a home to arrest a person based solely upon probable cause and while the person is still in the home, both the Fourth Amendment and Article I, section 7 of the Washington Constitution require suppression of the statement. Did the trial court err in failing to suppress Mr. Allen's statements made following the unlawful entry of his motel room and while he was still in the motel room?

7. Due process requires a trial court to instruct on a lesser included offense when requested by the defendant, where (1) the lesser offense is necessarily committed when one commits the greater offense as charged, and (2) in the light most favorable to the defendant the evidence supports an inference

that only the lesser offense was committed. In a prosecution for first degree murder as an accomplice, the State's evidence, when viewed in the light most favorable to Mr. Allen, permitted a reasonable juror to conclude Mr. Allen committed only rendering criminal assistance. Did the trial court deny Mr. Allen due process when it refused to provide the requested instruction on the lesser offense?

8. The general accomplice liability statute, RCW 9A.08.020, does not apply to sentencing enhancements or factors. Sentencing enhancements and aggravating factors may only apply to an accomplice if the statute establishing the enhancement or factor provides for accomplice liability. Neither RCW 9.94A.535, which establishes the aggravating factor used in this case, nor RCW 9.94A.537, which establishes the procedure for proving those factors to the jury, provide for accomplice liability. Did the court error in imposing an exceptional sentence in Mr. Allen's case?

9. The Sixth and Fourteenth Amendments impose an affirmative duty upon the trial court to ensure the jury's verdict is the product of the evidence presented at trial and is free of

influence from outside sources. The trial court concluded it could not limit courtroom spectators from wearing t-shirts memorializing the victims of Maurice Clemmons's crimes, even when those t-shorts were visible to the jurors during trial. Did the trial court's failure to ensure the jury's verdict was free of improper influences deprive Mr. Allen of his Sixth and Fourteenth Amendment rights?

D. STATEMENT OF THE CASE

Mr. Allen worked for a landscaping company Maurice Clemmons owned.

In May 2009 Maurice Clemmons began throwing rocks through his neighbors' windows. 42 RP 3305 When police responded, Clemmons wrestled with and punched the officers. Id. at 3307. At one point he began telling an officer to shoot him. Id. at 3308.

Clemmons illustrated other bizarre behavior. On several occasions he invited family to barbecues and told them celebrities such as Barack Obama, Oprah Winfrey, and LeBron James would be in attendance. 42RP 3309, 3322. On other

occasions Mr. Clemmons claimed to be Jesus Christ, and travelled to New York City to proclaim himself. 37RP 2769.

About six months following his arrest for his assault of the police officers, Mr. Clemmons posted bail and was released from jail the Monday before Thanksgiving. That week, and particularly at his family's Thanksgiving dinner, Clemmons expressed an animosity towards police officers that family members found shocking. 37RP 2749-52. Mr. Clemmons proclaimed to his family that if police came for him, he would be waiting with a gun. Mr. Clemmons also stated he would go to a school and kill the white children. 37RP 2753. Mr. Clemmons would not listen to reason. 37RP 2777. Mr. Allen was present at that Thanksgiving dinner.

On the following Sunday, Maurice Clemmons called Mr. Allen and told him that he wanted Mr. Allen to wash the company truck. Ex 288. Mr. Allen and Mr. Clemmons drove to a carwash at 212th and Steele in Pierce County. Id. Mr. Allen crossed 212th to an *ampm* store, where he purchased a cigar and obtained change for the carwash. 37RP 2762. Unbeknownst to Mr. Allen, Clemmons, too, left the carwash. Id.

Minutes later, Clemmons walked into a Forza Coffee shop a few blocks away and murdered four Lakewood Police Department officers. Clemmons then walked back to the carwash, arriving minutes after Mr. Allen returned from the *ampm*. Ex 288. Clemmons demanded that they leave immediately. Id. Mr. Allen drove the truck away from the car wash. Id.

Later that day, Clemmons arrived at the home of his cousin, Cicely Clemmons, and told her what he had done. 37RP 2746-47. In providing the details of his acts, Clemmons never said Mr. Allen did anything. Id. at 2780.

Maurice Clemmons was killed by a Seattle police officer in the early morning of December 2, 2009. 37RP 2826-30.

About an hour later a SWAT team stormed through the door of Mr. Allen's motel room and arrested him. 38RP 2924-25. Officers conducted a lengthy interrogation, during which Mr. Allen conveyed his lack of knowledge about Mr. Clemmons's intended acts. 39RP 2944; Ex 288. At the close of the interview, the lead detective commented that he had no doubt that Mr. Allen was being truthful. Ex 288.

Despite this belief, the State charged Mr. Allen with four counts of aggravated first degree murder, alleging two aggravating factors under RCW 10.95.020: the victims were law enforcement officers performing their duties at the time of the murder, and there was more than one victim killed as part of a common scheme or plan. CP 1-4. The State subsequently amended the charge to allege the aggravating factor set forth in RCW 9.94A.533 regarding offenses against law enforcement. CP 817-23.[1]

A jury convicted Mr. Allen of four counts of first degree murder. CP 2041-44.

A jury acquitted Mr. Allen of the aggravating factors in RCW 10.95.020. CP 2045-48. The jury however returned a special verdict form finding the aggravating factor alleged under RCW 9.94A.535, and found Mr. Allen or an accomplice were armed during the crime. CP 2049-56.

The trial court imposed an exceptional sentence of 420 years. CP 2180-82.

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[1] The difference in the charged aggravators is that a yes verdict on the aggravating factors of RCW 10.95.020 results in a mandatory sentence of life without parole, while the aggravating factors under 9.94A.535 permit but do not require an exceptional sentence.

E. ARGUMENT

1. Because the State did not prove Mr. Allen knew he was assisting in a crime, his convictions must be reversed.

A criminal defendant may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 US. 296, 300-01, 124. S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The constitutional rights to due process and a jury trial "indisputably entitle a criminal defendant to 'a jury determination that he is guilty of every element of the crime beyond a reasonable doubt.'" Apprendi, 530 U.S. at 476-77 (quoting Gaudin, 515 U.S. at 510).

This Court may affirm the conviction only if it can conclude that a rational trier of fact could find each element beyond a reasonable doubt. Green, 94 Wn.2d at 221-22.

a. The State had to prove Mr. Allen knew he was assisting in the commission of a murder.

RCW 9A.08.020 provides:

> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.
> (2) A person is legally accountable for the conduct of another person when . . . He or she is an accomplice of such other person in the commission of the crime.
> (3) A person is an accomplice of another person in the commission of a crime if:
> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
> (i) Solicits, commands, encourages, or requests such other person to commit it; or
> (ii) Aids or agrees to aid such other person in planning or committing it . . . .

A person cannot be convicted as an accomplice of a crime unless the State proves "that individual . . . acted with knowledge that he or she was promoting or facilitating *the* crime for which that individual was eventually charged." (Emphasis in original.) State v Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). "The Legislature . . . intended the culpability of an accomplice not extend beyond the crimes of which the accomplice actually has 'knowledge.'" State v. Roberts, 142 Wn.2d 471, 511, 14 P.3d 713 (2000).

The consolidated cases in Cronin make clear what the statute and Court require with respect to knowledge of the general offense. Cronin was convicted of first degree premeditated murder. The Court noted that this could only occur if the State proved beyond a reasonable doubt (1) Cronin acted with premeditated intent and murdered the victim; or (2) had knowledge that his confederate would murder the victim. Cronin, 142 Wn.2d at 581. Thus, Cronin did not have to have knowledge of each element of first degree murder to be guilty as an accomplice but was required to have knowledge that a murder would be committed.

In a case consolidated with Cronin, State v. Bui, the Court similarly held that where Bui was found guilty as an accomplice to a second degree assault, he had to be aware that his actions were facilitating an assault, although not the specific degree of assault. Cronin, 142 Wn.2d at 581. Cronin and Roberts establish that to convict a person as an accomplice he or she must have knowledge of the general crime the principal will commit.

To prove Mr. Allen was an accomplice to first degree murder the State was required to prove he knew he was facilitating, promoting or aiding in the commission of a murder. RCW 9A.08.010(1); RCW 9A.32.030. It is not enough that the State's evidence may have established he knew Mr. Clemmons might commit some crime or even that he should have known Mr. Clemmons intended to commit a murder.

RCW 9A.08.010(1) defines "knowledge" as:

> (b) . . . . A person knows or acts knowingly or with knowledge when:
> (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
> (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

The Supreme Court has made clear, the language contained in RCW 9A.08.101(1)(b)(ii) regarding a reasonable person is not an alternative definition of knowledge. State v. Shipp, 93 Wn.2d 510, 514-15, 610 P.2d 1322 (1980). This provision instead

> permits but does not require the jury to infer actual, subjective knowledge if the defendant has information that would lead a reasonable person in the same situation to believe that facts exist that are described by law as being a crime.

State v. Vanoli, 86 Wn. App. 643, 648, 937 P.2d 1166 (1997); Shipp, 93 Wn.2d at 516.

Shipp recognized there were three potential readings of RCW 9A.08.010(1)(b)(ii). First, an instruction mirroring the language of the statute could permit a juror to conclude that if a reasonable person might have known of a fact, the juror was required to find the defendant had knowledge. 93 Wn.2d at 514. Second, a juror could conclude the statute redefined "knowledge" to include "negligent ignorance." Id. Finally, a juror instructed in the language of the statute could conclude the statute requires he find the defendant had actual knowledge, "and that he is permitted, but not required, to find such knowledge if he finds that the defendant had 'information which would lead a reasonable man in the same situation to believe that (the relevant) facts exist.'" Id.

Addressing each of these alternatives in turn, Shipp found the first "clearly unconstitutional" as it creates a mandatory presumption. 93 Wn.2d at 515. The Court deemed the second alternative unconstitutional as well, as defining knowledge in a

manner so contrary to its ordinary meaning deprived people of notice of which conduct was criminalized. Id. 515-16.

In resting upon the third interpretation as the only constitutionally permissible reading, the Supreme Court said "[t]he jury must still be allowed to conclude that he was less attentive or intelligent than the ordinary person." Id. at 516. Thus, the "jury must still find subjective knowledge." Id. at 517.

Therefore, the State could not meet its burden merely by proving Mr. Allen should have known that Mr. Clemmons would commit murder, or should have know he was assisting in that crime. Instead, the State was required to prove beyond a reasonable doubt that Mr. Allen actually knew that he was assisting Mr. Clemons commit murder. The State did not meet that burden.

c. The State did not prove Mr. Allen knew he was assisting in the commission of a murder.

In its best light, the State's evidence established Mr. Allen was aware of Mr. Clemmons animosity towards and rantings about police. Mr. Allen was also aware that Mr.

Clemmons proclaimed himself to be Jesus and claimed to be friends with numerous celebrities.

The evidence established Mr. Allen and Mr. Clemmons arrived at a carwash on the corner of 212th and Steele several blocks from the coffee shop. Mr. Allen went across the street to a convenience store where he purchased a cigar. Mr. Allen then returned to the carwash. A minute or two following Mr. Allen's return, Mr. Clemmons returned to the carwash. There is no evidence that Mr. Allen dropped Mr. Clemmons somewhere else prior to arriving at the carwash, only to have Mr. Clemons rejoin him later. Indeed, the only evidence offered by the State on this point was Mr. Allen's statement that he and Mr. Clemmons arrived at the carwash together, but that Mr. Clemmons was gone when Mr. Allen returned from the convenience store. The State's evidence did not establish Mr. Allen had any knowledge of Mr. Clemmons's whereabouts while Mr. Allen was away from truck or carwash.

The State invited the jury to speculate that perhaps Mr. Allen had left Mr. Clemmons at the coffee shop and then drove alone to the carwash. But that speculation is not reasonable. If

Mr. Allen were aware that Mr. Clemmons was going to commit a crime and then hurriedly meet up with him a quarter of a mile away, there is no reasonable explanation for why Mr. Allen spent so much of the intervening time away from the truck at the convenience store across the street. That is simply not a reasonable inference to draw from the evidence.

The State's evidence established that the truck was in the carwash for about six minutes before Clemmons is seen approaching the truck from the south. The evidence establishes Mr. Allen spent the majority of that time away from the truck - at the *ampm*. The State's video evidence established there were at most only a few minutes during which Mr. Allen was at the carwash alone prior to Mr. Clemmons's return. At 8:04:49 a white truck is shown entering a stall at the carwash at 112th and Steele.[2] 38RP 2896. There is no recording of how many occupants were in the truck as it entered. Between 8:09:55 and 8:10:06, the video recorded a pedestrian crossing 212th southbound from the *ampm* to the carwash, presumably Mr. Allen. 38RP 2898. At 8:10:51 a pedestrian is shown, walking

[2] Grant Frederick testified that the video's time stamp was about three minutes (plus/minus 59 seconds) behind the actual time. 38RP 2903.

north on Steele, approaching the truck, presumablt Mr. Clemmons. 38RP 2900-01.

The cashier at the *ampm* testified that Mr. Allen purchased a cigar from the store at 8:14. 41RP 3165-66.[3]

Even in its best light, the State's evidence does not begin to establish Mr. Allen knew that he was assisting Mr. Clemmons the murder of four police officers. Accomplice liability requires more than an alleged accomplice's proximity to a crime. State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d (1981). Even proximity coupled with knowledge that his presence will aid in the commission of the crime is insufficient. Id. Instead, the State must establish the person was present and ready to assist in the commission of the crime. Id.

Further, it is not enough that others may have suspected Mr. Clemmons would commit his heinous acts, or even that a reasonable person would have. It cannot be enough that once Mr. Allen heard Clemmons's irrational diatribe about police officers, liability attached to anything Mr. Allen subsequently did with Mr. Clemmons. While Shipp and RCW 9A.08.010

[3] There was no evidence of the accuracy of the time-stamp on the store register receipts.

permit a jury to draw an inference of actual knowledge, the jury was still required to find Mr. Allen had actual knowledge that he was assisting Mr. Clemmons in the commission of murder. Cronin, 142 Wn.2d at 581. The State did not present such evidence.

Even in his subsequent description of events to his cousin Maurice Clemmons did not suggest Mr. Allen did anything to assist or was aware of what he, Clemmons, was doing. 37RP 2780. Instead, the State's evidence in its best light establishes that Mr. Allen assisted Mr. Clemmons leave the scene following the commission of his crimes, perhaps with knowledge that a crime occurred. That, however, only establishes the offense of rendering criminal assistance. See, RCW 9A.76.050.

The absence of evidence of knowledge sufficient to find Mr. Allen was acting as an accomplice is illustrated by the State's resort in closing argument to repeated and blatant misstatements of the law. In direct contradiction of Shipp, the deputy prosecutor repeatedly told the jury that RCW 9A.08.010(1)(b)(ii) permitted the jury to convict Mr. Allen even "if he doesn't actually know" Mr. Clemmons was going to commit

his horrendous crime. 45RP 3546. The State did not attempt to qualify its statements in terms of the permissive inference Shipp allows, nor did the State ever remind the jury that it was still required to find actual knowledge. Instead, the State's entire theory centered on the very negligent-knowledge theory that Shipp ruled was unconstitutional. Ex 351-54.

The State did not present sufficient evidence from which the jury could find beyond a reasonable doubt that Mr. Allen knew he was assisting Mr. Clemmons in the commission of the murder of four police officers.

d. The Court must reverse Mr. Allen's convictions.

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; Green, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an added element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989).

Because the State failed to prove Ms. Allen actually knew that he was assisting Maurice Clemmons in the murder of four police officers the Court must reverse his convictions.

2. THE DEPUTY PROSECUTORS' FLAGRANT MISCONDUCT IN CLOSING REQUIRES REVERSAL OF MR. ALLEN'S CONVICTIONS

a. The deputy prosecutor repeatedly misstated the law regarding knowledge.

Early in the State's closing argument, defense counsel objected to the State's purposeful misstatement of the law regarding knowledge. RP 3545-46. The trial court brushed aside the objection with the statement "its argument, overruled." RP 3546. The deputy prosecutor continued:

> If you look at the instructions, Ladies and Gentleman, he doesn't have to have a purpose that those officers die. He doesn't have to plan it. He doesn't even have to want the officers to die . . . And under the law, **even if he doesn't actually know**, if a reasonable person would have known, he should have known, he's guilty

(Emphasis added.) CP 3546. The deputy prosecutor repeated similar claims throughout his closing argument, and again in rebuttal. Mr. Allen renewed his objection in the State's rebuttal

argument. RP 3614. The court again allowed the State to miscast the law, saying "its argument." Id.

Beyond the prosecution's oral misstatements of the law, the State employed two power point presentations - one for its initial closing and one for rebuttal - each of which highlighted this misstated theme. These slides specifically set forth the standard of "should have known" as an alternative definition of knowledge.

The first slide following one bearing pictures of the the officers, provides:

> Those officers are dead because
> Dorcus Allen helped Maurice Clemmons.
> He knew or **should have known**
> Clemmons would murder the officers

(Emphasis added.) Ex 351-52. The deputy prosecutor followed this up with another slide highlighting "should have known" as an alternative mental state.

Mirroring its oral misstatements of the law, under the Title "SHOULD HAVE KNOWN," the state's presentation crossed off one mental state after the next:

- ~~Premeditate~~
- ~~Intend~~
- ~~Purpose~~
- ~~Plan~~
- ~~Want~~
- ~~Hope~~
- ~~Care~~
- ~~Know~~
- Should Have Known

Ex 351-52, at 30-31. The State presented numerous other slides highlighting "should have known" as an alternative mens rea sufficient to convict Mr. Clemmons regardless of his actual knowledge. Ex 351-52.

Based upon the State plain misstatements of the law, Mr. Allen made a motion for new trial 50RP 3659. The court denied the motion with no analysis of the law. Id. 3369

b. Prosecutorial misconduct deprives a defendant his due process right to a fair trial.

A prosecuting attorney is the representative of the sovereign and the community; therefore it is the prosecutor's duty to see that justice is done. Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934). A prosecutor is a quasi-judicial officer whose duty is to ensure each defendant receives a fair trial. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

c. The prosecutors' repeated misstatements of the law deprived Mr. Allen of a fair trial and of Due Process.

The deputy prosecutors' argument was a plain misstatement of the law. Shipp made clear a "jury must still find subjective knowledge." 93 Wn.2d at 517. In response to Mr. Allen's motion for a new trial, the prosecutor contended its misstatements were merely "shorthand" for the permissive inference that Shipp allows. 50 RP 3665. Despite the record,

the prosecutor claimed that following Mr. Allen's objection "I clarified that it was a permissive inference." Id. But the record is plain the deputy prosecutor never made such a clarification nor even mentioned the term "permissive inference." Instead, immediately following Mr. Allen's initial objection, the deputy prosecutor specifically told the jury "And under the law, even if he doesn't actually know . . . . he's guilty." RP 3546. That is not clarification of the law, but a blatant misstatement of what Shipp permits.

And beyond contradicting the law as announced by Shipp, the State's negligent-knowledge theory resurrects the "in for a dime in for a dollar" notion of accomplice liability which the Supreme Court rejected in Cronin and Roberts. In Cronin, the Court carefully explained that to find the defendant guilty of first degree premeditated murder, the State had to prove beyond a reasonable doubt (1) Cronin acted with premeditated intent and murdered the victim; or (2) actually had knowledge his confederate would murder the victim. Cronin, 142 Wn.2d at 581. Here, the State's theory did not require the jury to find either.

Nor can there be any doubt that the prosecution misstatement were intended. The Supreme Court has held that the flagrancy of misconduct is illustrated by repeated misstatements of the law. State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). In Warren the court found the prosecutor's misconduct was "certainly flagrant" where she misstated the meaning of proof beyond a reasonable doubt three times. Id. Here, the misstatement was the foundation of the State's closing argument and was repeated over and over again in both the prosecutors' oral statements as well as the accompanying slides.

> Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.

State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1018 (1996); review denied, 131 Wn.2d 1018 (1997).

The prosecution's belief of the necessity of its misstatement is evident by the sheer number of references to "should have known" as a basis of knowledge in the State's closing and rebuttal. It is apparent in the power point presentations, prepared in advance and displayed to the jury.

The State committed flagrant misconduct. The State's argument, and the trial court's refusal to correct the misstatement, created the very mandatory presumption which Shipp found to violate the Fourteenth Amendment.

d. The mandatory presumption created by the prosecutors' repeated misstatements and endorsed by the trial court requires a new trial.

Where a prosecutor commits misconduct but does not violate the defendant's constitutional rights, the defendant bears the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. See, e.g., State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (defendant bore burden of proving prejudice where prosecutor committed misconduct by violating evidentiary ruling); State v. Jones, 144 Wn. App. 284, 300, 183 P.3d 307 (2008) (defendant bore burden of proving prejudice where prosecutor committed misconduct by bolstering witness's credibility and arguing facts not in evidence).

But where a prosecutor violates a defendant's constitutional rights reversal is required unless State proves beyond a reasonable doubt the misconduct did not contribute to

the verdict obtained. See, e.g., Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor commented on defendants' exercise of constitutional right to silence); Monday, 171 Wn.2d at 680 (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor engaged in racial stereotyping in violation of constitutional right to impartial jury); State v. Moreno, 132 Wn. App. 663, 671-72, 132 P.3d 1137 (2006) (State bore burden of proving harmlessness beyond a reasonable doubt where prosecutor commented on defendant's exercise of his constitutional right to proceed pro se). Here, the State's repeated misconduct created a mandatory presumption of knowledge eliminating the State's burden of proving that element.

The Supreme Court has routinely applied Chapman to such mandatory presumptions, requiring reversal unless the error was "unimportant in relation to everything else the jury considered on the issue in question." Yates v. Evatt, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), overruled in

part on other grounds, Estelle v. McGuire, 502 U.S. 62, 12 S. Ct. 475, 116 L. Ed. 2d 385 (1991). To make this determination, a court must engage in a two-step analysis.

> First, it must ask what evidence the jury actually considered in reaching its verdict. . . [I]t must then weigh the probative force of that evidence as against the probative force of the presumption standing alone. To satisfy Chapman's reasonable-doubt standard, it will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue under Chapman is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. Since that enquiry cannot be a subjective one into the jurors' minds, a court must approach it by asking whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said, in Chapman's words, that the presumption did not contribute to the verdict rendered

Yates, 500 U.S. at 404-05. Thus, a reviewing court evaluating prejudice cannot rely on evidence drawn from the entire record "because the terms of some presumptions so narrow the jury's focus as to leave it questionable that a reasonable juror would

look to anything but the evidence establishing the predicate fact in order to infer the fact presumed." Id. at 405-06.

In this case, the effect of the presumption was not "comparatively minimal," but was instead the foundation of the State's case against Mr. Allen. The presumption narrowed the jury's focus so as to leave it questionable that a reasonable juror would look to anything but the evidence Mr. Allen should have known (the predicate fact) in order to infer knowledge (the fact presumed). Id, at 405-06. Indeed, the State told the jury that so long as they though Mr. Allen should have known "under the law, even if he doesn't actually know . . . . he's guilty." RP 3546. Under Yates and Chapman, the State cannot show the presumption was harmless beyond a reasonable doubt; i.e., that it did not contribute the verdict obtained in this case.

But even if one does not employ Chapman, the State's repeated and flagrant misconduct clearly had a substantial impact on the jury's verdict. The only issue in this case was whether Mr. Allen knowingly assisted in the murder of the four police officers. Shipp required a finding of actual subjective knowledge. 93 Wn.2d at 517. During its deliberations the jury

sent questions asking the court whether it could convict Mr. Allen simply on the basis that he should have known what Mr. Clemmons intended. CP 2014. Subsequent jury affidavits indicate several jurors relied on that mandatory presumption. CP 2121, 2125-26. The State's misstatement had its intended effect, misleading the jury from the law to instead apply a mandatory presumption based upon potential negligent ignorance.

The deliberate misstatement of the law requires reversal of Mr. Allen's convictions.

3. The trial court erred in failing to suppress the fruits of the warrantless entry of Mr. Allen's motel room.

a. Police entered Mr. Allen's motel room without the authority of law.

After several interviews with police, Reginald Robinson told police that Mr. Allen was staying in Room 25 at the New Horizon Motel in Federal Way. Detectives went to the motel and relayed the information they had to superiors at a command center who were coordinating the effort to locate Maurice Clemmons. CP 806. The superiors told the officers that they

wished to speak with Mr. Allen. 15RP 159. During that same conversation, they informed the officers at the motel that Maurice Clemmons was dead. CP 807.

About an hour later, police led by a SWAT team gathered outside the door to Room 25. Detectives on the scene maintained they went to the room merely to talk with Mr. Allen. 14RP 101, 141. The officers did not hear any sounds nor see any light emanating from the room. 14RP 80-81.

The members of the SWAT team, armed with rifles and shotguns, knocked on the door. 14RP 129, 143. When Latanya Clemmons answered the door, she was pulled aside and officers immediately entered and arrested Mr. Allen. 14RP 129. As officers were entering, Mr. Allen said "I knew you were coming and coming hard." CP 808.

Immediately following his arrest, Mr. Allen was taken to the Pierce County Sheriff's Office and placed in a holding cell. CP 2175. Mr. Allen remained in that holding cell for several hours until he was brought to another room for interrogation. Id.

Although it never addressed what authority permitted the officers' entry of the room, the trial court found the resulting arrest was lawful. CP 812; see also, CP 2177. Again focusing only on the warrantless arrest, the court found the arrest was justified by the serious nature of Maurice Clemmons' crimes, and the officers' generalized fear for their own safety. CP 812.

b. Police may not make a warrantless entry of a motel room absent some other authority of law.

Article I, section 7 of the Washington Constitution provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The Fourth Amendment provides ". . . no Warrants shall issue but upon probable cause supported by Oath or affirmation . . . ."

A search is not reasonable unless it is pursuant to a judicial warrant based upon probable cause or falls within an exception to the warrant requirement. Payton v. New York, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980); Mincey v. Arizona, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 (1978). The warrant requirement is particularly important under the Washington Constitution "as it is the

warrant which provides 'authority of law' referenced therein." State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (citing Seattle v. Mesiani, 110 Wn.2d 454, 457, 755 P.2d 775 (1988)). The State bears a heavy burden to prove the warrantless search at issue falls within an exception. See State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996); Mesiani, 110 Wn.2d at 457-58.

Payton held that the Fourth Amendment does not permit the warrantless entry of a person's home in order to arrest them. State v. Eserjose, 171 Wn.2d 907, 912, 259 P.3d 172 (2011). The Fourth Amendment's protection from a warrantless entry of a person's home applies equally to a guest in a hotel room. Stoner v. California, 376 U.S. 483, 490, 84 S.Ct. 889, 11 L.Ed.2d 856 (1964). Article I, section 7 "necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment." State v. Parker, 139 Wnh.2d 486, 493–94, 987 P.2d 73 (1999). Thus, entry of a motel room must satisfy the authority of law requirement of the state constitution.

c. The entry of Mr. Allen's motel room was made without the authority of law.

Importantly, the trial court did not make any finding justifying the warrantless entry of the motel room. CP 812 (Finding of Fact IV.8). Instead, the trial court concluded only that the warrantless **seizure** of Mr. Allen was justified by exigent circumstance. The court's remaining factors, too, focus only upon the reasonableness of the **detention** of Mr. Allen. See CP 812 (Findings of Fact IV.9; IV.11).

First, the "reasonableness" of the officers' actions is not determinative under Article I, section 7.

> As we have so frequently explained, article I, section 7 is not grounded in notions of reasonableness. Rather, it prohibits any disturbance of an individual's private affairs without authority of law."

State v. Snapp, __ P.3d __, 2012 WL 1134130, 8 (2012). But even if the detention were reasonable or justified by some exigency, the court did not make any findings of what legal authority permitted the officers to enter the room to make that detention. In the absence of legal authority to enter the motel room the subsequent arrest is unlawful.

But even assuming the trial court's findings regarding the seizure of Mr. Allen somehow relate back to the entry as well, the entry nonetheless violated both the Fourth Amendment and Article I, section 7.

Payton recognized that even probable cause to believe a person has committed murder is not sufficient to support a warrantless entry of that person's home.

> [A]n important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made . . . . although no exigency is created simply because there is probable cause to believe that a serious crime has been committed.

Welsh v. Wisconsin, 466 U.S. 740, 753, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984). Eserjose, too, refused to attach too much significance to the existence of probable cause. As discussed in more detail below, in concluding Article I, section 7 affords greater protection, the Court rejected United States Supreme Court decisions which held that even if the entry was unlawful ongoing seizure of the person once removed from the home was lawful so long as probable cause existed. 171 Wn.2d at 918 (distinguishing New York v. Harris, 495 U.S. 14, 110 S.Ct. 1640,

109 L.Ed.2d 13 (1990)). Eserjose concluded that sort of line drawing "falls short of the protection afforded by our constitution" Id.

But here, the trial court's findings of fact regarding the admission of evidence do not include a finding that probable cause existed.[4] Nor did the officers testify that they believed they had probable cause to arrest Mr. Allen for any offense.

According to Detective Steve Johnson, the officers had no intent to arrest Mr. Allen at all. Instead, the detective testified that despite the presence of the SWAT team he merely intended to talk with Mr. Allen. 141RP 101. The detective testified that his superiors had asked him to bring Mr. Allen to the station to talk about the case, not to arrest him. 14RP 101, 15 RP 159, 165. The detective arrested him nonetheless.

Detective Brian Byerley reiterated that officers went to the motel simply to talk with Mr. Allen. 14RP 117, 141. The police commanders, the ones gathering all the information and

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[4] The court's findings of fact and conclusions of law regarding the admissibility of Mr. Allen's statement under CrR 3.5 do contain a conclusion that "There was probable cause for the arrest of the defendant and such arrest was lawful." CP 2177. However, the court does not identify the offense for which officers possessed probable cause, nor articulate the basis for that conclusion.

directing the individual officers' activities, did not believe they had probable cause to arrest Mr. Allen for any offense much less murder. Their instructions are telling. Rather than insist upon his immediate arrest, they simply said they wanted to talk with him. 15RP 159.

Subjective belief of probable cause at the time of arrest is a necessary predicate to a lawful arrest. State v. Moore, 161 Wn.d2 880, 885, 169 P.3d 469 (2007). "Probable cause exists when the arresting officer has 'knowledge of facts sufficient to cause a reasonable [officer] to believe that an offense has been committed' at the time of the arrest. Id. (citing State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006)).

The State did not present a single police witness who claimed they possessed probable cause at the time they arrested Mr. Allen. And in fact, the trial court's findings emphasize Mr. Allen's dentition was simply for officer safety. See, e.g., CP 812 (Finding of Fact IV.9) ("It was reasonable for the others to not take chances with their own personal safety . . . . "). Thus, even if it does constitute an exigency in other circumstances, probable cause to believe Mr. Allen had committed a serious offense was

not the exigent circumstance justifying the warrantless entry of the motel room.

And despite the absence of a specific discussion, or even mention of, "probable cause," the trial court's findings establish at most that officers had probable cause to believe Mr. Allen had committed the offense of rendering criminal assistance. See also, 16RP 344 (prosecution arguing officers had probable cause of rendering criminal assistance). If probable cause of murder was not enough to justify the warrantless entry in Payton, probable cause of rendering criminal assistance could not justify the entry here. The result cannot change simply because a serious offense had been committed by someone else. Because Mr. Clemmons was killed about an hour prior to the entry of the motel room, a fact of which the officers were aware, the officers could not have reason to believe the person who committed the murder was in the motel room.

Welsh noted that in the context of a warrantless arrest in the home the Court to that date had only applied a single exigent circumstance, hot pursuit. 466 U.S. at 750. There is no evidence in the record to support a conclusion that the entry was

made in hot pursuit. To the contrary, the evidence established that the occupants of the room were unaware of the police presence. See, e.g., 14RP 80-81 (no sounds or light coming from room). And because of that, the police could not reasonably believe that immediate entry was necessary to prevent escape of the room's occupants.

There is no finding or evidence to support a belief that entry was necessary to prevent destruction of evidence. The officers had no knowledge of what evidence was inside. While potential evidence may have been inside, the same could be said of the home of every alleged suspect. The exigent circumstances exception requires some showing of why the evidence must be seized immediately as opposed to following a judicially-issued warrant. That showing was not made here.

The trial court made no finding that entry was justified by exigent circumstances. Additionally, the evidence before the court would not have permitted such a finding.

The entry of the motel room was made without any lawful authority and violated both the Fourth Amendment and Article I, section 7. Instead, the police could have, and were required,

to, obtain a warrant to enter Mr. Allen's motel room. While they waited for the warrant they were free to remain outside the room, so long as the motel manager consented.

d. The court erred in failing to suppress the fruits of the unlawful entry and arrest.

"Article I, section 7 provides greater protection of privacy rights than the Fourth Amendment." State v. Winterstein, 167 Wn.2d 620, 631-32, 220 P.3d 1226 (2009).

> The language of [Article I, § 7] constitutes a mandate that the right to privacy shall not be diminished by the gloss of a selectively applied exclusionary remedy. In other words, the emphasis is on protecting personal rights rather than curbing governmental actions.

State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Thus, unlike the Fourth Amendment exclusionary rule, the primary purpose of the exclusionary rule mandated by Article I, section 7 is not to deter government action, but instead "w*henever* the right is unreasonably violated, the remedy *must* follow." (Emphasis in original.) White, 97 Wn.2d at 110.

Consistent with that strict requirement, the Supreme Court has never endorsed an exception to the exclusionary rule which permits admission of the fruits of an unlawful search.

The lone exception recognized by the Court, the independent source doctrine, recognizes that while evidence was discovered by an illegal search it was also discovered by an independent lawful search. Winterstein, 167 Wn.2d at 633-34. In refusing to adopt the inevitable discovery exception, the exception's chief flaw as identified by the Court, was that the exception "does not disregard illegally obtained evidence." Winterstein, 167 Wn.2d at 634. Because the Court has never adopted an exception to the exclusionary rule which permits admission of illegally seized evidence none can apply here.

In addition, the State made no effort to establish an exception to exclusionary rule applied here. That failure precludes any attempt to rely upon such an exception on appeal. State v. Ibarra-Cisneros, 172 Wn.2d 880, 885, 263 P.3d 591 (2011). In Ibarra-Cisneros, the Court made clear that the State waived any argument regarding exceptions to the exclusionary rule where it did not raise the claim in the trial court, saying "courts should not consider grounds to limit application of the exclusionary rule when the State at a CrR 3.6 hearing offers no supporting facts or argument." Id. at 884-85. That preclusion

echoes the Court's earlier ruling in State v. Armenta, that where there is no finding on a necessary point, a reviewing court must presume the party with the burden of proof failed to establish that point. 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). Because the State made no effort to prove that an exception to the exclusionary rule would permit admission of the illegally obtained evidence, it has waived any such argument.

The United States Supreme Court has held the Fourth Amendment does not require exclusion from trial of a statement made by the defendant after such an unlawful arrest so long as the statement is made outside the home. Harris, 495 U.S. at 21. Thus, under the Fourth Amendment, Mr. Allen's statement **in the motel room** that "I knew you were coming and coming hard" must be suppressed. CP 808; 38RP 2995. With respect to the remainder of Mr. Allen's statements made following his unlawful arrest and outside the motel room, they are inadmissible under Article I, section 7.

In Eserjose, a majority of the Court found Harris to be incompatible with the exclusionary rule of Article I, section 7.

171 Wn.2d at 929, 940.[5] Therefore, under the Washington Constitution the exclusionary rule requires suppression of Mr. Allen's subsequent statement made at the police station, Ex 288; 39RP 2950, because the State did not establish an exception exist to the exclusionary rule.

The trial court erred in failing to suppress Mr. Allen's statements.

4. The trial court erred in refusing Mr. Allen's request to instruct the jury on rendering criminal assistance as a lesser included offense of first degree murder as charged in this case.

a. Mr. Allen properly requested an instruction on the lesser offense of rendering criminal assistance.

Mr. Allen requested the court instruct the jury on the crime of rendering criminal assistance as a lesser included offense. CP 1923-27 (Defense Proposed Instructions 55-58); 44RP 3464. The trial court refused to provide such an

[5] The lead opinion authored by Justice Alexander rejected Harris but would adopt the attenuation doctrine. That opinion garnered two concurring justices and a third justice who concurred in the result only. Justice Madsen wrote a separate opinion in which she would have adopted Harris and did not address attenuation. The four Justice dissent found both Harris and the attenuation doctrine to be incompatible with Article I, section 7. Thus only three Justices endorsed the attenuation doctrine.

instruction. 44RP 3485. The court did not explain the basis of its ruling.

b. Due process requires a court provide instructions on lesser offenses where those instructions are supported by the evidence in the case.

Generally a criminal defendant may only be convicted of those offenses charged in the information, or those offenses which are either lesser included offenses or inferior degrees of the charged offense. Schmuck v. United States, 489 U.S. 705, 717-18, 109 S.Ct. 2091, 103 L.Ed. 734 (1989); State v. Tamalini, 134 Wn.2d 725, 731, 953 P.2d 450 (1998) (citing State v. Irizarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1998)). However, RCW 10.61.003 and RCW 10.61.006 permit a conviction for an offense which is a lesser included offense of the offense charged.

The failure to instruct the jury on a lesser offense, where the evidence might allow the jury to convict the defendant of only the lesser offense violates the Fourteenth Amendment. Beck v. Alabama, 447 U.S. 625, 636-38, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

c. The trial court erroneously denied Mr. Allen's request to instruct the jury on the lesser offense.

An instruction on a lesser offense is warranted where: (1) each element of the lesser offense must necessarily be proved to establish the greater offense as charged (legal prong); and (2) the evidence in the case supports an inference that the lesser offense was committed (factual prong). State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

A court reviews *de novo* the legal prong of a request for a jury instruction on a lesser included offense. State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). The factual prong is reviewed for an abuse of discretion. Id. at 771–72.

i. Rendering criminal assistance is a lesser offense of first degree murder as charged in this a case.

Under the legal prong of the lesser-included test, each of the elements of the lesser offense must be a necessary element of the offense charged. In applying that test, the court looks only at the alternative(s) under which the State has charged the defendant. Thus, in Berlin the Court addressed the question of

whether manslaughter was a lesser offense of intentional second degree intentional murder, without regard to whether it was a lesser offense of second degree felony murder as Ms. Berlin was not charged under that theory. 133 Wn.2d at 550.

Here, the State did not allege Mr. Allen killed the officers. Rather, the State alleged Mr. Allen knowingly assisted Mr. Clemmons in the killing of the four officers. A person charged as an accomplice to first degree murder is necessarily guilty of rendering criminal assistance to that crime. Rendering criminal assistance is merely complicity directed at flight. RCW 9A.76.050. A person is an accomplice if "[h]is . . . conduct is expressly declared by law to establish his or her complicity." RCW 9A.08.020(3)(b). Because the rendering statute expressly declares certain conduct establishes complicity, rendering is necessarily included in the definition of complicity. Thus, rendering criminal assistance is a lesser included offense of complicity generally, and first degree rendering criminal assistance is legally a lesser included offense of first degree murder.

Despite the direction of Berlin that the court must consider the crime as charged, the State urged the trial court that it need not address murder as charged: that it could disregard the fact that the State's theory was that Mr. Allen was guilty only as an accomplice. 44RP 3477. The State argued that complicity was not an alternative means of committing a crime and the court need not consider it under the legal prong. That argument ignores the fact that rendering is a separate basis of complicity liability, one which is necessarily included in that definition of "accomplice." The court had to consider the offense as charged, and thus it does not matter whether complicity is an alternative means or not.

And, while it is not necessary to resolve Mr. Allen's entitlement to the instruction based on the manner in which the State charged him, he nonetheless addresses the question of whether accomplice liability must be treated as an alternative means when analyzing the propriety of the instruction on a lesser offense.

In State v. Carothers, the Court repeated what had long been the law in Washington, that an accomplice was equally

guilty of a crime as the principal. 84 Wn.2d 256, 264, 525 P.2d 731 (1974). This conclusion was based entirely upon the language of the then-existing complicity statute. Id. That statute, former RCW 9.01.030 provided:

> Every person concerned in the commission of a felony, gross misdemeanor or misdemeanor, whether he directly commits the act constituting the offense, or aids or abets in its commission, and whether present or absent; and every person who directly or indirectly counsels, encourages, hires, commands, induces or otherwise procures another to commit a felony, gross misdemeanor or misdemeanor, is a principal, and shall be proceeded against and punished as such. The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent, shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him claim

In 1975, however, the Legislature adopted a new complicity statute, RCW 9A.08.020, which provides in relevant part:

> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.
> (2) A person is legally accountable for the conduct of another person when:
> . . .
> (c) He or she is an accomplice of such other person in the commission of the crime.

> (3) A person is an accomplice of another person in the commission of a crime if:
> (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
> (i) Solicits, commands, encourages, or requests such other person to commit it; or
> (ii) Aids or agrees to aid such other person in planning or committing it; or
> (b) His or her conduct is expressly declared by law to establish his or her complicity

Laws of 1975, 1st Ex. Sess. ch. 260, § 9A.08.020.

Unlike its predecessor, the current statute requires an accomplice have knowledge that he is assisting in the crime of conviction. Cronin, 142 Wn.2d at 581. Moreover, "knowledge" requires the person have actual knowledge of the requisite act. Shipp, 93 Wn.2d at 517. Thus, while under the former statute the State need only prove a crime was committed and that the defendant aided or abetted in that crime the State now must prove an additional fact; that the accomplice aided or abetted with actual knowledge that he was assisting in the crime committed.

Every statutory amendment is intended to serve a material purpose. Vita Food Products, Inc. v. State, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). The addition of knowledge as an

element of accomplice liability must be interpreted as altering the nature of accomplice liability.

Despite the addition of this knowledge element, courts have never revisited the question of accomplice liability as an alternative theory but rather simply resorted to reference to Carothers for the familiar conclusion that accomplice liability is not an alternative theory. Again, Carothers did nothing more than interpret the then existing statute. Carothers could not have concluded that a yet enacted statute that requires proof of an additional fact imposed similar liability.

That the modern statute altered the principle of accomplice liability is clear in another way. The former statute assigned culpability and punishment for both the substantive offense as well as any enhancements. RCW 9A.08.020, however, applies only to the substantive offense and not to any enhancement or aggravator. State v. McKim, 98 Wn.2d 111, 116, 653 P.2d 1040 (1982). The Court has already recognized that RCW 9A.08.020 altered the pre-1975 standard of accomplice liability, such that an accomplice is no longer automatically subject to the same punishment as the principle.

With that recognition, as well as the addition of the element of knowledge, there is no reason to rely on interpretations of the former statute as controlling of the current statute's meaning and assignment of liability.

Because RCW 9A.08.020 requires proof of specific knowledge, a fact that is not required to prove the principal actor's guilt, it is an alternative theory. Thus, accomplice liability is an alternative means of committing a crime, and the court was required to consider it as such in determining whether the legal prong of the lesser-included analysis was satisfied.

ii. In the light most favorable to Mr. Allen a reasonable juror could have found he was only guilty of rendering criminal assistance.

In applying the factual prong, a court must view the supporting evidence in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The instruction should be given "[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708

(1997) (citing Beck, 447 U.S. at 635). Importantly, in reaching this determination the trial court cannot "limit[] its view of the evidence [to that presented by the defense] but must consider all of the evidence that is presented at trial." Id. (citing State v. Bright, 129 Wn.2d 257, 269-70, 916 P.2d 922 (1996)).

Viewed in the light most favorable to Mr. Allen, the evidence supported the inference that only the lesser offense of rendering criminal assistance had been committed. In the light most favorable to Mr. Allen, his statement to police established he did not know Mr. Clemmons intent that morning. Mr. Allen told police he did not know Mr. Clemmons intended to commit murder. Ex 288. That alone establishes the factual inference necessary to support the requested instruction.

But beyond that, the State's video evidence proved ample support for a reasonable juror to easily conclude Mr. Allen did not know that Maurice Clemmons intended to kill four police officers when the two men arrived at the carwash. That conclusion would be amply supported by the fact that during the majority of time that the truck was shown in the carwash stall, Mr. Allen was on his way to, at, or returning from the

convenience store across the street. A juror could easily conclude a person aware of the murder of four police officers a few blocks away, and of his own supposed role, would not engage in such routine acts which posed the risk of jeopardizing his own role as the getaway driver. Clearly a person cannot drive a perpetrator away from the scene of a crime if the person is not in his car but rather across the street buying a cigar.

The facts viewed in the light most favorable to Mr. Allen supported the requested instruction.

d. The Court should reverse Mr. Allen's convictions.

"A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case." State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Mr. Allen was entitled to the requested instruction in this case. Fernandez-Medina, 141 Wn.2d at 461-62. The trial court's failure to instruct the jury on the lesser offense violated the Fourteenth Amendment. Beck, 447 U.S. at 636-38. This court must reverse Mr. Allen's convictions.

5. Because accomplice liability does not extend to aggravating factors the Court must reverse Mr. Allen's sentence.

The accomplice liability statute, RCW 9A.08.020, cannot be the basis to impose a sentencing enhancement on an accomplice. McKim, 98 Wn.2d at 115–16. Instead, the language of the applicable sentencing statute must provide a basis to apply accomplice liability for the sentencing provision. Id. at 116.

RCW 9.94A.535(3)(v), which defines the aggravator used in this case, provides:

> The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

RCW 9.94A.535(3)(v). Nothing in that statute provides for accomplice liability.

Some courts have interpreted McKim as permitting the imposition an enhancement in the absence of specific statutory language so long as the State proves the defendant's acts alone were the basis for the enhancement. State v. Pineda-Pineda,

154 Wn. App. 653, 664, 226 P.3d 164 (2010). But McKim did not reach that conclusion. Instead, McKim concluded that the firearm enhancement could be triggered by constructive possession, and that an accomplice's knowledge of the presence and use of a firearm was sufficient to establish constructive possession. Constructive possession, in turn, would permit application of the enhancement to the accomplice. The Court subsequently summarized its holding as follows:

> In McKim, we held that the deadly weapon statute, RCW 9.95.040, requires that the State prove the defendant was either actually or constructively armed with a deadly weapon. Constructive possession exists if the defendant knew his coparticipant was armed.

(Internal citations omitted.) State v. Davis, 101 Wn.2d 654, 658, 682 P.2d 883 (1984). Thus, the enhancement applied to McKim because he was armed as defined by the statute.

Because it found the accomplice's actions fit within in the statutory language, i.e., he was armed based upon constructive possession, McKim does not stand for the broader proposition that even in the absence of specific language an accomplice may be subject to an enhancement so long as his acts separately

support the enhancement. In any event, there are no similar construction provisions for aggravating factors. Therefore, there is no means to conclude an accomplice's acts fit within the statutory language regarding aggravating factors.

Under McKim, because RCW 9.94A.535 and RCW 9.94A.537 do not provide for accomplice liability, the aggravating factors cannot apply to accomplices.

But even if one were to follow cases such as Pineda-Pineda it would be necessary to find the "act" forming the basis of the accomplice's liability for the aggravator is an "act" separate from his complicity in the crime. Otherwise, every accomplice to a crime would be liable for aggravating factors simply because of the acts of the principal, i.e., because of accomplice liability. But, if that were the case there would be no need for specific language in the sentencing statute regarding accomplice liability. McKim, however, held otherwise.

Further, the legislature responded to McKim by including express language in the relevant statutes to apply accomplice liability to deadly weapon and firearm enhancements. See e.g., RCW 9.94A.533(3) ("The following additional times shall be

added to the standard sentence range . . . if the offender *or an accomplice* was armed with a firearm."). No similar provision appears in the RCW 9.94A.535 or RCW 9.94A.537. Thus, the State was required to prove some "act" beyond Mr. Allen's complicity in the murder which subjects him to the aggravating factor. There is no proof of such an act.

Additionally, the SRA, and specifically RCW 9.94A.535 and RCW 9.94A.537, dictate the sentencing court's authority to submit facts supporting the aggravating factors to a jury. State v. Davis, 163 Wn.2d 606, 611, 184 P.3d 689 (2008) (citing State v. Pillatos, 159 Wn.2d 459, 474, 150 P.3d 1130 (2007)). As such, a trial court's decision whether to permit the jury to hear the facts in the first instance cannot turn on what facts the State ultimately offers. Either courts have the authority to submit the proof to the jury or they do not. Quite clearly nothing in the relevant statutes provides that authority.

The aggravating factor cannot apply to Mr. Allen and his sentence must be reversed.

6. The trial court's failure to ensure the jury's verdict was free of improper influences from displays by courtroom spectators deprived Mr. Allen of his Sixth and Fourteenth Amendment rights.

Several courtroom spectators wore t-shirts which started "You will not be forgotten, Lakewood Police" and then listed the names of the four officers. 40RP 3024;. The t-shirts were visible from the jury box. Mr. Allen asked the court to direct the individuals to either remove or cover up the t-shirts. The trial court refused, concluding the spectators' rights to free speech could not be abridged, without any consideration of Mr. Allen's right to a fair trial. 40RP 3027.

The following day, when spectators again arrived wearing the t-shirts, Mr. Allen again objected and renewed his motion that the court take steps to ensure the jury was not unduly influenced. 41RP 3156. Again without any balancing of Mr. Allen's right to a fair trial, the court denied the motion. 41RP 3157.

a. The Sixth and Fourteenth Amendments require a trial court to ensure a defendant receives a fair trial in which the verdict is free of improper influences.

> [T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.

(Citations omitted) Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). Essential to that right is that jurors' decisions are based solely on the evidence presented at trial. Turner v. Louisiana., 379 U.S. 466, 471, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); Sheppard v. Maxwell, 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). The Court has restated this principle numerous times. Justice Holmes said "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." Patterson v. People of the State of Colorado, 205 U.S. 454, 462, 27 S.Ct. 556, 51 L.Ed. 879 (1907). More recently the Court said:

> [o]ne accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the

> evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.

Holbrook v. Flynn, 475 U.S. 560, 567, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986) (quoting Taylor v. Kentucky, 436 U.S. 478, 485, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978)). And the court has made clear the trial court is charged with ensuring the protection of this right, and "must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law." Chandler v. Florida, 449 U.S. 560, 574, 101 S.Ct. 802, 66 L.Ed.2d 740 (1981).

A necessary component of this right is that the courtroom be free of improper influence. The Washington Supreme Court recently explained:

> [Courthouses] are a stage for public discourse, a neutral forum for the resolution of civil and criminal matters. The unique setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to "the integrity of the trial" process.

State v. Jaime, 168 Wash. 2d 857, 867, 233 P.3d 554 (2010)(quoting Estes v. Texas, 381 U.S. 532, 561, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965) (Warren, C.J., concurring)). Thus, "the

trial judge has an affirmative obligation to control the courtroom and keep it free of improper influence." Carey v. Musladin, 549 U.S. 70, 82, 127 S. Ct. 649, 656, 166 L. Ed. 2d 482 (2006) (Souter, concurring).

b. The trial court failure to keep improper influences from the courtroom deprived Mr. Allen a fair trial.

A defendant's fair trial right has been violated when a courtroom practice creates "an unacceptable risk" of "impermissible factors coming into play." Estelle v. Williams, 425 U.S. 501, 504-05, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). Such a practice is determined to be inherently prejudicial to the defendant's right to a fair trial. Id.

Washington has ruled that small displays of ribbons or buttons *containing no written messages* do not inherently prejudice the defendant. See In re the Personal Restraint of Woods, 154 Wn.2d 400, 416, 114 P.3d 607; State v. Lord, 161 Wn.2d 276, 165 P.3d 1251, (2007). In Woods, remembrance ribbons worn by spectators during a murder trial were permitted with the caveat that the judge could provide a jury instruction to mitigate any prejudicial effects. Id. at 417.

Important to the court's decision was the fact that the ribbons "did not contain any inscription. They were simply ribbons that the wearers indicated they wore in memory of the victims." Id. at 417. Similarly in Lord, the picture buttons worn, "did not bear any message regarding guilt or innocence." Lord, 161 Wn.2d at 289.

Here, spectators wore full, matching T-shirts, not small pins or buttons. And most importantly, the t-shirts bore a written message – indeed, an entire sentence together with the names of the victims. The trial judge made no caveat for a corrective jury instruction. Indeed, the court's ruling suggests the court did not believe it had the ability, never mind the obligation, to in any way limit the jury's prejudicial exposure to the message of sympathy. As in Williams, these circumstances created a courtroom atmosphere that was inherently prejudicial to the defendant.

No essential state policy or safety concern required the court to permit the demonstration. Indeed, the display of support or sympathy for one side only impairs the truth-seeking function of a trial. Furthermore, the demonstration cannot be

justified by the understandable desire of community members to express their grief. The family members' interest in expressing grief publicly, and even within the confines of the criminal justice process, is already sufficiently protected. Const. Art. I, § 35. Crime victims and their families and supporters are, like other members of the public, afforded the right of access to criminal trials. Id. They have a voice in the form of prosecution, and are permitted a further role in the penalty phase of trial. Id. Prosecutors, not spectators supporting victims, are the appropriate parties to enter into the trial record any evidence regarding the victim that is properly relevant to the adjudication of the defendant's guilt or innocence.

Further, the trial court's belief that the free speech rights of spectators could not be abridged is simply contrary to long-established law. A defendant's right to a fair trial is superior to the First Amendment rights of nonparticipants. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980). Nor is it clear that wearing such shirts in court is even within the freedom of speech. "[I]n securing freedom of speech, the Constitution hardly meant to create the

right to influence judges or juries." Pennekamp v. Florida, 328 U.S. 331, 366, 66 S.Ct. 1029, 90 L.Ed. 1295 (1946) (Frankfurter, J., concurring). As stated more recently Justice Stevens recently reiterated this view on a similar issue:

> In my opinion, there is no merit whatsoever to the suggestion that the First Amendment may provide some measure of protection to spectators in a courtroom who engage in actual or symbolic speech to express any point of view about an ongoing proceeding.

Musladin, 549 U.S. at 79 (Stevens, concurring).

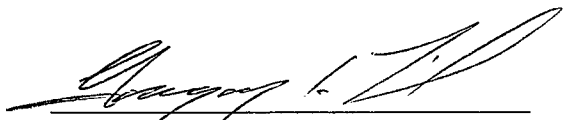
The trial court failed to meet its obligation to ensure Mr. Allen received a trial free of the improper influences of courtroom spectators. That failing requires reversal of Mr. Allen's convictions.

F. CONCLUSION

The State's failure to prove Mr. Allen knew he was aiding in the commission of a murder as well as the State's purposeful misstatement of the law in closing argument requires reversal of Mr. Allen's convictions. Additionally, the trial court's failure to suppress the fruits of the unlawful entry of Mr. Allen's motel room requires reversal of his convictions. So too, the other

errors set forth above require this Court reverse Mr. Allen's convictions and sentence.

Respectfully submitted this 31st day of May, 2012.



GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	NO. 42257-3-II
v.	)	
	)	
DARCUS ALLEN,	)	
	)	
APPELLANT.	)	

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